No. 85-1626

(9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, *et al.*,
Petitioners,

v.

LUKENS STEEL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND ITS LOCALS 1165 AND 2295

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
JULIA PENNY CLARK *
MICHAEL H. GOTTESMAN
JOHN ROTHCHILD
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

58P

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the limitations period for claims brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981, is properly determined by reference to the statute of limitations in the appropriate state governing claims of injury to the person.

2. If the answer to the first question is yes, whether the rule thus established should be applied to the § 1981 claims in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1626

CHARLES GOODMAN, *et al.*,
Petitioners,
v.
LUKENS STEEL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND ITS LOCALS 1165 AND 2295

COUNTER-STATEMENT OF THE CASE

This case presents the question of what statute of limitations should be applied to an action filed under 42 U.S.C. § 1981 in Pennsylvania in 1973, at a time when "there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims." *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 512 (3d Cir. 1986), *petition for cert. granted*, 107 S.Ct. 62 (1986). Resolving that question requires, first, a decision whether the court of appeals correctly held that in cases brought under § 1981, like those brought under § 1983, the appropriate state statute of limitations to apply is that governing claims for personal injury, and second, whether the court of appeals correctly determined that that rule should be applied to the § 1981 claims in this case.

The petition for certiorari in this case was filed by Charles Goodman, *et al.*, the plaintiffs in the district court. Respondents are the plaintiffs' employer, Lukens Steel Company, and the unions that represent the hourly employees at Lukens, the United Steelworkers of America, AFL-CIO-CLC, and its local unions 1165 and 2295.[1] The plaintiffs' complaint in the district court challenged a wide variety of employment practices that were alleged to be racially discriminatory, for example, initial assignments upon hire, testing, promotions, racial harassment, and union representation. Plaintiffs sought to litigate all of these claims on behalf of an across-the-board class over the entire period beginning in June 1965. From the very early stages of the action, questions were raised regarding the appropriate statute or limitations for the claims asserted under § 1981.

At the time that this action was filed, Pennsylvania had two periods of limitations that could arguably have been applied to § 1981 claims. One statute, 12 Pa. Stat. § 31, enacted in 1713, prescribed a 6-year limitations period for "actions upon the case, other than for slander, . . . actions for account, . . . actions for trespass, debt, detinue and replevin, for goods or cattle, and . . . actions

---

[1] The unions also filed a petition for certiorari, No. 85-2010. That petition was granted and consolidated with this one for argument. The unions' petition challenges the lower courts' findings that the unions were liable under both § 1981 and Title VII of the Civil Rights Act of 1964. Depending upon the resolution of the questions raised in that petition, it may be unnecessary for the Court to address the statute of limitations questions presented here.

Lukens Steel Company, the employer, was also a defendant in the district court and is nominally a respondent in this case. Lukens, however, has reached a settlement with the plaintiffs, and that settlement has been approved by the district court. Two individual plaintiffs have filed an appeal from the district court's order approving that settlement. Subject only to the outcome of that appeal, Lukens has no further interest in this case.

of trespass quare clausum fregit . . . ." (Pet. App. A179).[2] A separate statute, 12 Pa. Stat. § 34, enacted in 1895, prescribed a 2-year limitations period for "[e]very suit hereafter brought to recover damages for injury wrongfully done to the person, in cases where the injury does not result in death." (Pet. App. A179). *See A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 333-35 (3d Cir. 1986).[3] As plaintiffs acknowledge, at the time their action was filed there were no reported cases in Pennsylvania or in the Third Circuit that had held which of the Pennsylvania limitations periods was appropriate for § 1981 claims. Brief for Petitioners, at 42-43 n.29.

The employer argued in January 1974, in opposing plaintiffs' motion for class certification, that the appropriate limitations period for the § 1981 claims in the instant case was the 2-year period prescribed by Pa. Stat. § 34 for "injury wrongfully done to the person." The employer stated:

> [T]here is persuasive authority that the gravamen of a Section 1981 action is in tort, and that the two-year Pennsylvania tort statute of limitations should limit the claims asserted on behalf of the class.[4]

The authorities on which the employer relied all came from jurisdictions outside the Third Circuit.[5] The union argued that an even shorter limitations period applied:

---

[2] This same statute also prescribed a 2-year limitations period for "actions of trespass, of assault, menace, battery [or] imprisonment . . . ."

[3] These statutes have subsequently been repealed and replaced by a new statutory scheme of limitations. The new statutory provisions expressly do not apply to claims that accrued before June 27, 1978. See Judiciary Act of 1976, Act No. 142, 1976 Pa. Laws 586.

[4] Memorandum of Defendant, Lukens Steel Company, in Opposition to Plaintiffs' Motion for Designation as a Class Action, R. 12, at 9.

[5] *Id.*

the 90-day period prescribed for filing claims under the Pennsylvania Human Relations Act.[6] Plaintiffs countered by arguing that "[t]he state causes of action most nearly analogous to Section 1981 as applied herein are based on employment contracts," and that an action on such a contract would be covered by one of the forms of action listed in 12 Pa. Stat. § 31 and thus would have a 6-year limitations period.[7] Plaintiffs cited no Pennsylvania or Third Circuit authority for this position; like the employer, they relied entirely on decisions from other jurisdictions.[8]

In June 1975, the district court ruled, without stating any reasons or identifying the particular theory on which it relied, that "the applicable [Pennsylvania] statute is the six-year limitation provided in 12 [Pa.] Stat. Ann. § 31. Under this view, claims arising on or after June 14, 1967, are cognizable in this action." (Pet. App. A60).[9]

Four years after this suit was filed, in 1977, in a case arising in Pennsylvania, the Third Circuit issued its first decision on the selection of a limitations period for a § 1981

[6] Defendant Unions' Memorandum in Opposition to Plaintiffs' Motion for Designation as a Class Action, R. 13, at 4-5. (This Court ruled a decade later that such administrative time limits are not to be borrowed for § 1981 claims. *Burnett v. Grattan*, 468 U.S. 42 (1984).)

[7] Reply Brief of Plaintiffs in Support of Their Motion for Designation as a Class Action, R. 29, at 16-17.

[8] *Id.*

[9] In this brief "Pet. App." citations refer to the Petition Appendix that was filed in No. 85-1626. "JA" citations refer to the consolidated two-volume Joint Appendix that was filed for Nos. 85-1626 and 85-2010.

The district court reaffirmed its limitations ruling after trial. (Pet. App. A70). The limitations period for claims asserted under Title VII was held to begin in May 1970 for certain claims against the employer and in April 1971 for all other claims, including all claims against the opinion. (*Id.* A71-372).

case. In *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 900 (3d Cir. 1977), the court observed that the federal district courts in Pennsylvania were in conflict on the limitations period that should be applied in discrimination claims brought under § 1981 and under 42 U.S.C. § 1982 (which was originally enacted, along with § 1981, as section 1 of the Civil Rights Act of 1866). Some of the district courts had applied the 2-year period applicable to personal injury claims and others had applied the 6-year statute. 559 F.2d at 900. The court of appeals determined that the 6-year statute applied "to actions under sections 1981 and 1982 alleging a wrongful refusal to sell or rent housing." *Id.* at 903 n.27. The following year, in *Davis v. United States Steel Supply Division*, 581 F.2d 335, 339, 341 n.8 (3d Cir. 1978), the court of appeals applied the 6-year limitations period to a claim of racially discriminatory discharge brought under § 1981.[10]

In 1984 the district court made its findings on liability and entered injunctions against the employer and the unions, all of whom filed interlocutory appeals. Among the issues raised on appeal was the appropriate limitations period for the § 1981 claims. The employer defendant continued to assert that the appropriate period was supplied by the 2-year statute governing claims of injury to the person. While the appeal was pending, this Court announced its decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), which addressed the selection of statutes of limitations in cases brought under § 1983, and held that the state limitations period governing claims of personal injury should apply in all § 1983 cases. The court of ap-

[10] In so ruling, the *Davis* court stated:

> We reiterate that, for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that 12 P.S. § 31 applies to actions where the gist of a § 1981 complaint concerns racially discriminatory discharge of an employee under the facts in this record. *Id.* at 341 n.8.

peals then requested supplemental briefing on the limitations issue in this case in light of *Wilson v. Garcia*.

The court of appeals, in the decision now on review, reconsidered its prior decisions in *Meyers* and *Davis*, *supra*, and, applying an analysis parallel to that of this Court in *Wilson v. Garcia*, held that the appropriate limitations period for § 1981 claims, under the state limitations statutes in force when the complaint was filed, was Pennsylvania's 2-year period for claims of injury to the person. (Pet. App. A7-A16). The court applied that 2-year statute of limitations to the § 1981 claims in this case.

> We hold . . . that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in *Smith v. City of Pittsburgh*, [764 F.2d 188 (3rd Cir.), *cert. denied*, 106 S.Ct. 349 (1985)] we also conclude that our decision should be given the customary retroactive effect. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985).

(Pet. App. A13).[11]

In subsequent opinions the court of appeals has specifically referred to its decision in the instant case and has

[11] At an earlier point in its opinion in the instant case, the court had described its holding in *Smith v. City of Pittsburgh* as follows: "In view of the previous unsettled law in this and other circuits, in *Smith* we . . . determined that *Wilson v. Garcia* should be applied retroactively." (Pet. App. A9). In *Fitzgerald v. Larson*, 769 F.2d 160, 164 (3d Cir. 1985), the court had said:

> We thus conclude, as we did in *Smith v. City of Pittsburgh*, that the law was not sufficiently clear to have made it reasonable for a plaintiff to have delayed filing suit for more than two years after May 1979 in the expectation that a six-year limitation period would apply to a claim of wrongful discharge in violation of the First Amendment. The Supreme Court's decision in *Wilson v. Garcia* did not have the effect, in this situation, of overruling "clear past precedent on which litigants *may have relied*." *Chevron Oil Co. v. Huson*, 404 U.S. at 106, 92 S. Ct. at 355 (emphasis added).

further explained the reasons for that decision. In *Al-Khazraji v. Saint Francis College*, *supra*, 784 F.2d at 512, the court held that its decision in the instant case would not be applied retroactively to bar Al Khazraji's claims. The court distinguished the state of the law in 1978, when Al Khazraji's claims arose, from the law prior to 1973, when the claims in the instant case arose. The court said:

> In 1973, when the complaint was filed in the *Goodman* case, there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims. However, when the cause of action in Al Khazraji's case arose, in early 1978, this was no longer true.

784 F.2d at 512 (footnote omitted).

Similarly, in *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 345 n.10 (3d Cir.), *petition for cert. granted sub nom. Agency Holding Corp. v. Malley-Duff & Associates*, 107 S. Ct. 569 (1986), the court of appeals said:

> In *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985), we applied *Wilson v. Garcia* retroactively to a claim brought under 42 U.S.C. § 1981. [This result] followed from the uncertainty that existed with regard to the applicable limitations period under Pennsylvania law prior to [*Goodman*], making it not inequitable to apply *Wilson* retroactively. See *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

As a result of its decision to apply the two-year period of limitations for personal injuries to the instant case, the court of appeals ruled that in subsequent proceedings at "Stage II," to determine individual relief for class members, no relief would be available for acts occurring prior to June 14, 1971. (Pet. App. A15-A16).[12] In addi-

[12] The court of appeals also modified the limitations period for Title VII claims against the unions, holding that no liability could

tion, the court was unable to determine whether the evidence pertaining to events after that date would allow findings of classwide violations with respect to plaintiffs' claims of racial harassment or of discrimination in promotions from the hourly workforce to salaried positions. The court of appeals therefore vacated those findings of liability, without otherwise addressing defendants' contentions in regard to those findings, and remanded for the district court to determine whether classwide violations had occurred within the newly defined limitations period. (Pet. App. A14-A15).[13]

SUMMARY OF ARGUMENT

I.

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court held that all claims asserted under § 1983 are best characterized, for purposes of borrowing state limitations periods, as actions for personal injury. The principles and considerations that led the Court to that conclusion lead to the same result with respect to all claims asserted under § 1981.

A. At the threshold, there is no dispute between the parties here that, like claims under § 1983, all claims under § 1981 should be given a single uniform characterization for statute of limitations purposes. The same considerations that led this Court in *Wilson* to conclude that all § 1983 claims should be characterized in a uniform way apply to § 1981 as well. *Wilson* determined that § 1988, which applies to § 1981 as well as to § 1983, should be "construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims." 471 U.S. at 275. Under § 1981 as well as § 1983, a rule that calls for applying different limitations periods to different claims "depending upon the varying factual circumstances and legal theories presented in each individual case," would produce "uncertainty" as to the applicable limitations period and "useless litigation on collateral matters." 471 U.S. at 268, 275.

B. The key consideration leading this Court in *Wilson* to characterize § 1983 claims as personal injury claims was that the rights protected by § 1983 are personal rights. The gravamen of the rights established by § 1983 is the protection of persons against violation of rights guaranteed by the Fourteenth Amendment, including the rights of equal protection and equal status under state laws. That is the basic nature of a § 1983 claim regardless of whether the alleged violation of constitutional rights involves the deprivation of economic interests or of other interests.

Similarly, the rights protected by § 1981 are personal rights. As this Court held in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 378, 391 (1982), the gravamen of every § 1981 claim is intentional discrimination based on race. Section 1981 protects the right of each person to be free of such discrimination. What is now § 1981 was originally enacted to make effective the Thirteenth Amendment's ban on slavery. The legislative history makes clear that the statute was intended to secure the "right of personal security," the "right of personal liberty," the "right of personal property," the "right of petition," and all other rights that

---

be found for actions occurring before June 2, 1971. (*Id.* A28-A29). As a result, the period of potential liability for the unions under both § 1981 and Title VII began in June 1971.

[13] Plaintiffs argue that because the limitations ruling was the only reason for the court of appeals' order vacating these findings of liability, reversal of the limitations ruling would require reinstatement of those findings. Brief for Petitioners, at 5, 9, 46. However, because the court of appeals vacated those findings without in any way addressing the merits of defendants' other contentions on appeal in regard to those findings, the appropriate disposition in the event of reversal on the limitations issue would be to remand the case for the court of appeals to consider those other contentions. Of course, if the unions prevail on the issues raised in their petition, No. 85-2010, such a remand may be unnecessary.

are the attributes of free people, as opposed to slaves. See *infra*, at 17. The provision was a forerunner of the Fourteenth Amendment, and, after adoption of that Amendment, was reenacted to implement the Fourteenth Amendment's guarantee of equal protection of the laws.

As the terms and the history of § 1981 make clear, § 1981 was intended to deal with discrimination affecting a wide range of interests that are not economic in nature. In its terms it secures the right of equal treatment in the judicial system as a party or a witness, in the "benefit of all laws and proceedings for the security of persons and property," and in the imposition of punishment, penalties, taxes, and so on. But even where the statute addresses economic interests, Congress' purpose was not to establish or protect those interests as such, but to prevent intentional discrimination as to those interests. In the words of a chief supporter of § 1981 in the Senate, the "only object" of the provision was "to secure equal rights to all citizens of the country," "to break down all discrimination between black men and white men." See *infra* at 21.

Accordingly, as *Wilson* concluded with respect to § 1983, "[a] violation of [the] command [of § 1981] is an injury to the individual rights of the person." 471 U.S. at 277. A claim of violation of § 1981 is appropriately characterized as a claim of injury to the person for statute of limitations purposes.

II.

1. Plaintiffs contend that if this Court determines that state statutes of limitations for personal injury claims govern § 1981 claims, that rule should not be applied to the § 1981 claims in this case. Plaintiffs argue this point as if the rule governing the choice of a limitations period in § 1981 actions were already established by a prior decision of this Court—*Wilson v. Garcia*—and as if the question here were whether that rule should be applied retroactively to the instant case, which was pending on appeal when *Wilson* was decided. But *Wilson* did not decide the rule governing the limitations period for § 1981 cases. *Wilson* decided only what the rule should be in § 1983 cases. The rule in § 1981 cases is to be established in the instant case. Therefore, the question here is not whether *Wilson* should be applied retroactively, but whether the rule adopted in this case as a matter of first impression should be applied to the parties in this case.

It has been this Court's consistent practice, in civil and criminal cases, to apply the rule of law adopted in a case to resolve the issue between the parties in that case. This practice is rooted in the most basic principles of this Court's jurisprudence: this Court does not decide questions put in the abstract or issue advisory opinions; this Court resolves real issues which affect real interests of the parties before the Court. Whatever rule this Court may adopt in this case as to the statute of limitations for § 1981 claims, "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution," *Stovall v. Denno*, 388 U.S. 293, 300-301 (1967), require that that rule be applied to govern the dispute between the parties in this case.

2. Even if, *arguendo*, it were appropriate to characterize the issue here as the retroactivity of the *Wilson v. Garcia* rule, the standards established by this Court to determine such questions would require that the rule be applied in this case.

In civil cases, from the time of Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), it has been "the general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969). *Chevron v. Huson*, 404 U.S. 97 (1971), defines a limited exception to that rule. To come within that exception, in a case such as this, a litigant "must" show that the decision in question "establish[es] a new principle of law . . . by overruling clear

past precedent on which litigants may have relied . . . ." *Id.* at 106. As the Third Circuit has found, in the period preceding the filing of this lawsuit there was *no* precedent in the Third Circuit on which plaintiffs could have relied to support a limitations period longer than the 2-year period for personal injury claims. For this reason alone—and because plaintiffs have also failed to satisfy the other *Chevron* factors—there is no occasion in this case to depart from the rule of *Schooner Peggy*.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE APPROPRIATE LIMITATIONS PERIOD FOR CLAIMS ASSERTED UNDER § 1981 IS THE STATE LIMITATIONS PERIOD APPLICABLE TO ACTIONS FOR PERSONAL INJURY.

In *Wilson v. Garcia, supra*, this Court held that all claims asserted under § 1983 are best characterized, for limitations purposes, as actions for personal injury. 471 U.S. at 265-66; *see also Springfield Township School District v. Knoll*, 471 U.S. 288 (1985). The principles and considerations that led the Court to that conclusion lead to the same result with respect to claims asserted under § 1981.

A. As With § 1983, The Federal Interests Require A Uniform Characterization For Statute Of Limitations Purposes Of All Claims Brought Under § 1981.

There is no dispute between the parties here that all claims under § 1981 should be given a single uniform characterization for statute of limitations purposes. Plaintiffs concede that the same considerations that led to this holding in *Wilson v. Garcia* with respect to § 1983 apply as well to § 1981. Brief for Petitioners, at 10.[14]

[14] The *amici* Lawyers' Committee for Civil Rights Under Law, *et al.*, unlike plaintiffs, do not concede that a single uniform characterization is required under § 1981. Brief for the Lawyers' Committee for Civil Rights Under Law, *et al.*, as Amici Curiae in Support of Petitioners, at 10-13. Because this issue has been raised, if only by *amici*, we address it briefly in the text.

This concession is fully supported, and virtually compelled, by the reasoning in *Wilson v. Garcia*.

The source that led the Court in *Wilson v. Garcia* to require a single uniform characterization of § 1983 claims was 42 U.S.C. § 1988, in which Congress provided for the selection of procedural and substantive rules to flesh out the causes of action it had established in the Reconstruction Civil Rights Acts.[15] Section 1988 applies equally to § 1981 and to § 1983. *See Moor v. County of Alameda*, 411 U.S. 693, 704-06 n.19 (1973). The Court concluded in *Wilson v. Garcia* that § 1988 should be "construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims." 471 U.S. at 275. The reasons supporting this conclusion with respect to § 1983 apply equally to § 1981: in actions under § 1981 as in those under § 1983, a rule that calls for applying different limitations periods to different claims "depending upon the varying factual circumstances and legal theories presented in each individual case," would produce intolerable "uncertainty" as to

[15] Section 1988 provides, in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

the applicable limitations period and "useless litigation on collateral matters." 471 U.S. at 268, 275.[16]

B. Section 1981 Claims, Like § 1983 Claims, Are Most Appropriately Characterized As Claims for Personal Injury.

The remaining question is what uniform characterization is most appropriate for § 1981 claims. The answer, again indicated by the analysis in *Wilson v. Garcia*, is that the same characterization that applies to § 1983 claims should also apply to claims under § 1981, and thus that all § 1981 claims should be characterized as personal injury claims.

---

[16] *Amici* Lawyers' Committee *et al.* argue that there is less need for a rule of uniformity under § 1981 than under § 1983, because § 1983 has come to be used for a greater variety of claims and subjects than § 1981. Brief for the Lawyers' Committee, *et al.*, at 10-11. But § 1981 does, in fact, embrace a substantial variety of potential claims, see page 19, *infra*, and prior to *Wilson v. Garcia* the courts reached widely varying conclusions about the appropriate characterization for limitations purposes of a variety of § 1981 claims. *E.g., Breland v. Board of Education of Perry County*, 729 F.2d 360 (5th Cir. 1984) (1-year period for action on unwritten contract of employment); *Shah v. Halliburton Co.*, 627 F.2d 1055 (10th Cir. 1980) (3-year period for action on unwritten contract); *Tyler v. Reynolds Metals Co.*, 600 F.2d 232 (9th Cir. 1979) (1-year period for liability based on statute); *Page v. U.S. Industries, Inc.*, 556 F.2d 346 (5th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978) (1-year period for "offenses or quasi-offenses"); *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975) (2-year period for personal injuries), *aff'd*, 427 U.S. 160 (1976); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (3-year residuary statute that applies to both personal injuries and contracts). Indeed, in this case, plaintiffs propose characterizing § 1981 claims as the relatively uncommon tort of interference with contract relations. If this Court were to rule that courts are free to characterize individual § 1981 claims differently, depending on the particular legal or factual basis of each claim, the same potential for uncertainty and wasteful litigation over collateral matters would continue to exist under § 1981 as it did before *Wilson* under § 1983. *See Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416, 1421 (D.C. Cir. 1986).

1. In *Wilson v. Garcia*, this Court held that the characterization of a federal claim for limitations purposes must be "derived from the elements of the cause of action, and Congress' purpose in providing it." 471 U.S. at 268. Using the analysis employed in *Wilson*, both of these factors require that § 1981 claims be characterized as claims for personal injury.

The key consideration in this Court's analysis in *Wilson v. Garcia* was that the rights protected by § 1983 are personal rights. The Civil Rights Act of 1871, which is the source of § 1983, was enacted to enforce the Fourteenth Amendment, and the rights that the Fourteenth Amendment protects are personal rights, including specifically the rights to "equal protection" and "equal status" under state laws. The Court reasoned:

> Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract. The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every *"person"* subject to the jurisdiction of any of the several States. The Constitution's command is that all *"persons"* shall be accorded the full privileges of citizenship; no *person* shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

471 U.S. at 277 (emphasis in original, footnote omitted).

This key consideration is equally compelling in the context of § 1981. This Court held in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982), that the essential element of every § 1981 claim is intentional discrimination based on race. The entire thrust of § 1981 is thus to require equal treatment of all persons without regard to race in the areas covered

by the statute. This right of equal treatment, as the Court held in *Wilson v. Garcia, supra,* is a personal right, and a violation of that right "is an injury to the individual rights of the person." 471 U.S. at 277.

This Court's analysis in *Runyon v. McCrary,* 427 U.S. 160 (1976), reached the same conclusion. In *Runyon,* plaintiffs brought suit under § 1981 to challenge the discriminatory refusal of two private schools to accept black students. The Court characterized the schools' action as a discriminatory refusal "to enter into contractual relationships . . . for educational services." *Id.* at 172. In affirming the Fourth Circuit's decision to apply the Virginia statute of limitations for personal injuries, this Court characterized the injury involved as a *tort* and an *injury to the person.* The Court said:

> Moreover, the petitioners have not cited any Virginia court decision to the effect that the term "personal injuries" in § 8-24 [of the Virginia Code] means only "physical injuries." It could be argued with at least equal force that the phrase "personal injuries" was designed to distinguish those causes of action involving torts against the person from those involving damage to property. And whether the damages claim of the Gonzaleses be properly characterized as involving "injured feelings and humiliation," as the Court of Appeals held, 515 F.2d, at 1097, or the vindication of constitutional rights, as the petitioners contend, there is no dispute that *the damage was to their persons, not to their realty or personalty.*

Id. at 182 (emphasis added).

"Congress' purpose in providing" the § 1981 cause of action, *Wilson v. Garcia, supra,* 471 U.S. at 268, requires the same conclusion. What is now § 1981 was originally enacted as part of § 1 of the Civil Rights Act of 1866. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422 & n.28 (1968). That statute was enacted to implement the Thirteenth Amendment's abolition of slavery. *Id.* at 431-32. The essence of Congress' intent

in enacting § 1 was to eliminate racial discrimination, *id.* at 432, to keep black people from being "oppressed and in fact deprived of their freedom," *id.* at 431, and to secure for them the full benefits of the "freedom" and "liberty" that had been granted by the Thirteenth Amendment, *id.* at 433-34. The legislative history contains repeated statements to the effect that the bill would secure the "right of personal security," the "right of personal liberty," the "right of personal property," and the "right of petition." [17] *See also General Building Contractors, supra,* 458 U.S. at 387. "The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves." *Id.* at 388.

The court of appeals in the instant case correctly perceived that the evil addressed by the Thirteenth Amendment is, beyond doubt, an injury to the person:

> Present day § 1981's predecessor was founded on the Thirteenth Amendment that allows "neither slavery nor involuntary servitude" to exist any longer. It is difficult to imagine a more fundamental injury to the individual rights of the person than the evil that comes within the scope of that amendment.

Pet. App. A11.

After the 1866 Civil Rights Act was enacted, Congress proposed the Fourteenth Amendment "in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land' " and in part "to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *General Building Contractors, supra,* 458 U.S. at 385, 389, *quoting from Hurd v. Hodge,* 334 U.S. 24, 32-33 (1948). Section 1981 and the Fourteenth Amendment were "prod-

---

[17] *E.g.,* Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (remarks of Rep. Wilson, chairman of the House Judiciary Committee); *id.* at 1293 (remarks of Rep. Shellabarger); *id.* at 1833 (remarks of Rep. Lawrence).

ucts of the same milieu and were directed against the same evils"; they "were expressions of the same general congressional policy." *General Building Contractors, supra*, 458 U.S. at 384-85, 391. After the Fourteenth Amendment was ratified, Congress reenacted the relevant provisions of the 1866 Civil Rights Act in the Enforcement Act of 1870, 16 Stat. 140. *Id.* at 385-86.

The purpose for enacting § 1981 was thus virtually identical to the purpose for enacting § 1983. Both statutes were intimately tied to the Fourteenth Amendment, and both were enacted to implement its guarantee of equality.

> In light of the close connection between [the 1866 and 1870 Civil Rights] Acts and the [Fourteenth] Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.

Id. at 389-90. Because the Fourteenth Amendment's guarantee of equality is a personal right whose violation is a personal injury, *Wilson v. Garcia, supra*, 471 U.S. at 277, § 1981 must also be construed to secure a personal right, and the actions that it authorizes must be characterized for limitations purposes as suits for personal injuries.

2. Notwithstanding these authorities, plaintiffs, in an effort to justify adoption of the limitations period that serves their purposes in this case, would characterize a statute intended to make effective the Thirteenth Amendment's ban on slavery and the Fourteenth Amendment's guarantee of equal protection of the laws as a statute designed primarily to protect economic interests, particularly interests related to the making and enforcing of contracts. This limited characterization of § 1981 is refuted not only by the authorities already cited, but also by the terms of the provision itself and by the provision's history.

On its face, the range of conduct that § 1981 proscribes is far broader than plaintiffs would have it. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

By its terms, the statute prohibits racial discrimination affecting a wide range of interests: not only the making and enforcing of contracts, but also participation in the judicial system as a party or witness, the full benefit of all laws and proceedings for the "security of *persons* and property," and the imposition of punishment, penalties, taxes, and so on. Even if the unifying focus of the statute—the prevention of race discrimination—is ignored, the statute is still addressed as much or more to non-economic interests as to interests that can be characterized as economic. *See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 (1973) (racial discrimination in admission of guests to private swimming pool); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (racial discrimination in selection of jurors); *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), *vacated on other grounds, sub nom. Tyus v. Martinez*, —— U.S. ——, 106 S.Ct. 1787 (1986) (racially motivated arrest, prosecution, and denial of fair trial); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978) (racially discriminatory surveillance); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (racially motivated abuse of suspect, false arrest and false testimony).

Moreover, it is abundantly clear from both the terms of § 1981 and its legislative history that to the extent the statute does address economic interests, Congress' purpose was not to establish or protect economic inter-

ests as such, but rather to prohibit racial discrimination in the enjoyment of such rights as may otherwise exist. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court quoted from the remarks of Rep. Shellabarger, a prominent supporter of the 1866 Act:

> [The Bill's] whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by state laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery . . . . Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise . . . . It secures . . . equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.

Cong. Globe, 39th Cong., 1st Sess., 1293 (1866), *quoted in part in McDonald, supra*, 427 U.S. at 293. The Court also quoted remarks of a prominent supporter of the 1866 Act in the Senate, Senator Trumbull, who declared that the "only object" of the Bill was "to secure equal rights to all the citizens of the country," "to break down all discrimination between black men and white men." Cong. Globe, 39th Cong., 1st Sess., 599 (1866), *quoted in McDonald, supra*, 427 U.S. at 290. *See also* Cong. Globe, 39th Cong., 1st Sess., 1832 (1866) (remarks of Rep. Lawrence); *Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984) (§ 1981 "guarantees the right to be free from racial discrimination in specific activities, such as making contracts and bringing suit").

Plaintiffs nonetheless argue that § 1981 was enacted principally to eliminate the infamous Black Codes which, they argue, had the primary effect of denying freedmen "any freedom to enter into contracts or to acquire property." Brief for Petitioners, at 15. While it is true that the Black Codes were one of the principal subjects of the debate on the 1866 Civil Rights Act, the legislative history makes clear that the aspect of the Black Codes that most concerned the lawmakers was not simply their denial of the economic rights to make contracts or own property, but rather their effective nullification of the Thirteenth Amendment's promise of freedom. The Black Codes required freedmen to secure passes in order to travel from place to place, denied them access to public education, denied them the rights to file suit or serve as witnesses in legal actions, restricted rights of marriage, declared them to be vagrants if they were unable to secure employment, forbade them to preach or teach, and imposed far harsher penalties for crimes or other infractions than would be imposed on whites.[18] Supporters of the civil rights bill argued that the practical effect of such laws was to restore the institution of slavery.

> [U]nder the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a freeman; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow

[18] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (remarks of Sen. Trumbull); *id.* at 1151-52 (remarks of Rep. Thayer); *id.* at 1160 (remarks of Rep. Windom); *id.* at 1271 (remarks of Rep. Kerr); *id.* at 1759 (remarks of Sen. Trumbull).

> him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.

Cong. Globe, 39th Cong. 1st Sess., 475 (1866) (remarks of Sen. Trumbull). Congress' intention in nullifying the Black Codes was to prevent the states from making freedmen subject to discriminatory personal restraints that could have the effect of reinstating slavery.[19]

Moreover, even if the primary concern about the Black Codes had been their derogation of economic interests, this Court's analysis of the 1866 legislative history has repeatedly led it to conclude that the 1866 Congress was concerned about far broader problems than the Black Codes. In *Jones v. Alfred H. Mayer Co.*, the Court recited legislative history from the 1866 Act that revealed Congress' concern with "'private outrage and atrocity' [that] were 'daily inflicted on freedmen . . . ,'" and its concern about "citizens who assaulted Negroes or who combined to drive them out of their communities." 392 U.S. at 427-28 (footnotes omitted). A report before Congress described not only laws restricting the rights of black persons, but also "lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted." *Id.* at 428-29. The Court relied upon this evidence of legislative intent in concluding that Congress meant in § 1981 to do more than nullify the Black Codes: Congress also meant to protect black persons from discriminatory private conduct and "giv[e] real content to the freedom guaranteed by the Thirteenth Amendment." *Id.* at 433-36. *See also McDonald v. Santa Fe Trail*, *supra*, 427 U.S. at 296 ("the statutory structure

[19] *See also* Cong. Globe, 39th Cong., 1st Sess., 503-04 (1866) (remarks of Sen. Howard); *id.* at 603 (remarks of Sen. Wilson); *id.* at 1123-24 (remarks of Rep. Cook) ("those States have already passed laws which would now virtually reenslave them"); *id.* at 1152 (remarks of Rep. Thayer); *id.* at 1785 (remarks of Sen. Stewart) (purpose is "to secure to the freedmen personal liberty"; "to remove the disabilities existing by laws tending to reduce the [N]egro to a system of peonage").

> and legislative history [of the 1866 Act] persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves").

3. The close relationship between § 1981 and § 1983 makes it inconceivable that Congress would have intended that they be governed by different statutes of limitations. As we have discussed, the two statutes were enacted at essentially the same time, to implement the same constitutional provisions and to serve the same basic purposes. Moreover, there is a large area of overlap between the two statutes, in which the claims that they authorize are identical. Because § 1983 prohibits all acts of intentional racial discrimination committed under color of state law, *e.g.*, *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 150-52 (1970), every § 1981 claim that is asserted against a person or entity acting under color of state law could also be brought as a claim under § 1983.

In *Wilson v. Garcia*, *supra*, the Court held that one purpose of Congress in enacting § 1988 was to achieve consistency in the limitations treatment of claims under § 1983. In rejecting the possibility of adopting different characterizations for different § 1983 claims, depending on the subject matter, the Court said:

> [U]nder such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State, and multiple periods of limitations would often apply to the same case. *There is no reason to believe that Congress would have sanctioned this interpretation of its statute.*

471 U.S. at 260-261 (footnotes omitted; emphasis added).

The same problems, which this Court concluded that Congress wished to avoid, would result if § 1981 and § 1983 claims were given different characterizations for limitations purposes. Because of the substantial overlap between the two statutes, many actions against pub-

lic entities assert that the same conduct violates both statutes. *E.g., Burnett v. Grattan, supra,* 468 U.S. at 44 (suit for racial discrimination in employment based on § 1981 and § 1983); *Firefighters Local 1784 v. Stotts,* 467 U.S. 561 (1984) (employment discrimination suit based on § 1981 and § 1983). In other cases, claims that are identical may be asserted under either § 1981 or § 1983. *E.g., Wygant v. Jackson Board of Education,* —— U.S. ——, 106 S.Ct. 1842 (1986) (claim essentially the same as that in *Stotts, supra,* asserted under § 1981). And, of course, employment discrimination cases that can be asserted under § 1983 against public employers are identical in all respects, except the identity of the defendant, to claims that are routinely asserted against private employers under § 1981. *E.g., compare Burnett v. Grattan, supra,* 468 U.S. at 43-44 (§ 1981 and § 1983 claim of racially motivated discharge by public employer); *with McDonald v. Santa Fe Trail, supra,* 427 U.S. at 275-76 (§ 1981 claim of racially motivated discharge by private employer). The court of appeals rightly perceived that applying different statutes of limitations to identical claims, based solely upon which of these two closely related statutes the plaintiff chooses to invoke, would produce a "bizarre result." (Pet. App. A12). As this Court made clear in *Wilson v. Garcia,* it is just this kind of unwarranted inconsistency that Congress would have wanted to avoid. Section 1988 should therefore be construed to provide for the same characterization of both § 1981 and § 1983 claims; both should be characterized as personal injury actions—the characterization which, as we have shown, is in any event the appropriate one for both types of claims.

C. Section 1981 Claims Cannot Properly Be Characterized as Actions for Interference with Existing or Prospective Contractual Relations.

Plaintiffs urge that the single uniform characterization that should be applied to all § 1981 claims is not an action for personal injury, but instead an action for

tortious interference with existing or prospective contractual relations. Such a characterization is inappropriate: it misconceives both the nature of § 1981 actions and the nature of a claim of tortious interference.

By proposing the use of a characterization that sounds in tort, plaintiffs implicitly concede that § 1981 actions are properly characterized as actions in tort, rather than in contract. This concession is, indeed, compelled by this Court's existing analysis of § 1981, which establishes that the gravamen of the action is intentional discrimination based on race. *See* page 15, *supra.*[20] Plaintiffs nonetheless argue that the proper characterization should be as a tort that centers on injury to contract rights, rather rather than one that centers on injury to personal rights.[21] But, as we now show, plaintiffs' proposed char-

[20] For this reason, the suggestion of the *amici* Lawyers' Committee, *et al.,* that the Court should characterize all § 1981 claims as "contract" or "economic injury" claims must also be rejected. The existence of a contract, or of any other economic interest, is not a common element of all § 1981 claims, while the personal affront of race discrimination is. Moreover, statutes of limitations for contract claims are tailored to the substantive rules of contract law, which include a number of doctrines such as the parol evidence rule and the Statute of Frauds, that are designed largely to confine contract claims to those that can be substantiated by documents. As we discuss at note 27, *infra,* § 1981 claims generally are not so reliably proved or disproved.

[21] In a passing comment in their Statement of the Case, Plaintiffs contend that the court of appeals' decision in this case produced an "anomalous" result not fully consistent with Pennsylvania law because Pennsylvania's two-year statute of limitations, the former 12 Pa. Stat. § 34, "was limited to claims for damages arising out of bodily personal injuries." Brief for Petitioners, at 4-5. The Pennsylvania courts, however, never imposed such a limitation on 12 Pa. Stat. § 34. Our research has revealed no reported decision in the state courts that declined to apply that section to non-bodily personal injuries; on the contrary, a decision in 1956 applied 12 Pa. Stat. § 34 to an alleged invasion of the right of privacy, *Hull v. Curtis Publishing Co.,* 182 Pa. Super. 86, 125 A.2d 644 (1956). *Cf. Moore v. McComsey,* 459 A.2d 841, 844 (Pa. Super.

acterization is a very poor analogy to § 1981 claims. Many claims that can be asserted under § 1981 have nothing to do with contracts, and even among those claims that do involve contracts, only the rarest of § 1981 cases involves conduct akin to conduct constituting the tort of interference with contractual relations.

The aim of selecting a single uniform characterization for all § 1981 claims must be to find a characterization that, as nearly as possible, reflects the essential character of all claims that may be brought under the statute. Plaintiffs argue that the primary focus of § 1981 is to protect the right to make and enforce contracts, Brief for Petitioners at 12-13, 16, but as we have already shown, the statute's scope is far broader, pages 15-23, *supra*. It also protects the right to be free of discrimination in judicial proceedings, the right to the equal benefit of laws and procedures for "the security of *persons and property*," and the right to equal treatment in punishments, penalties, etc. Most of the rights which § 1981 expressly protects thus have nothing to do with contracts, existing or prospective, or even with other economic in-

---

1983) (in action brought under Pennsylvania's new statutory scheme, court holds that action against public defender under § 1983 for alleged legal malpractice resulting in unjustified incarceration is governed by statute for "injuries to the person," relying on definition in Black's Law Dictionary that "personal injury" includes "any injury which is an invasion of personal rights"). As far as we have been able to determine, the only court that has ever thought Pennsylvania's personal injury statute to be limited to "bodily injuries" was the Third Circuit, in *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 902 (3d Cir. 1977), and it did so despite its acknowledgment of the contrary decision in *Hull*. *Id.* at 902 n.25. Moreover, subsequent to *Meyers*, and apparently contrary to its holding, the Third Circuit has described the Pennsylvania statutes of limitations that were in effect when the instant case was filed as prescribing a six-year period for "trespasses to land" and a two-year statute for "trespasses to the person," without limiting "personal injuries" to "bodily injuries." *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 335 (3d Cir. 1986).

terests. The existence of a current or prospective contractual relation is therefore not a common element in all § 1981 claims, or even in most of the potential claims encompassed by the statutory language. See cases cited at page 19, *supra*.

Moreover, even in those claims that do involve contracts, the suggested characterization of § 1981 as an action for *interference* with contractual relations accurately describes only the rarest of § 1981 claims. Plaintiffs assert that because most modern § 1981 claims involve employment or housing discrimination, those claims consist of "interference with existing or prospective contractual relations." Brief for Petitioners, at 18-19. But that assertion overlooks a key distinction between employment discrimination and tortious interference with contract. The tort of interference with contractual relations protects contracting parties from conduct of an *outsider* that induces either a breach of an existing contract or a refusal to enter into a prospective contract; the tort cannot be committed by one of the contracting parties. *E.g., Prosser & Keeton on Torts* § 129, at 990 (5th ed. 1984); Restatement (Second) of Torts § 766 & comment *b* (1979). The vast majority of contract-related claims asserted under § 1981 involve no outsider, but consist simply of one contracting party's racially motivated conduct within a contractual relationship or a racially motivated refusal to enter into such a relationship. This Court's cases of *McDonald v. Santa Fe Trail*, *supra*, 427 U.S. at 285; *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975), for example, are § 1981 cases presenting the classic situation of an employee suing his employer for discrimination *within* the contractual relationship. Similarly, in *Runyon v. McCrary*, the § 1981 claim that the Court recognized was a private offeror's "refus[al] to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees." 427 U.S. at 170-71. These

claims are typical of the vast majority of § 1981 claims that are brought under the "making and enforcing contracts" provision of § 1981. They do not involve the kind of third-party interference with the contract relations of others that characterizes the tort of interference with contract relations.

Even in the instant case, plaintiffs' claims cannot fairly be analogized to tortious interference with contract relations. All of the claims asserted against the employer in this case were claims similar to those asserted in *McDonald* and *Johnson v. Railway Express.* The "contract" that was the basis for plaintiffs' claim was the employment relationship between the employer and its employees; the claims were that the employer had treated black employees and white employees differently within that contractual relationship. Only the claim against the unions involved a third party to a contractual relationship, and only an extreme stretch of the imagination would allow that claim to be characterized as a tortious interference with contract relations. The claim on which plaintiffs prevailed against the unions was a claim that the unions failed affirmatively to combat the employer's discrimination.[22] This is the *opposite* of a claim that the unions *induced the employer* to breach the contractual rights of its black employees. The tort of interference with contract is, in sum, a very poor analogy to the claims asserted in this case, let alone to the vast majority of those § 1981 claims that are related to contracts.

The analogy to tortious interference with contract fails for yet another reason. In *Wilson v. Garcia*, one of the federal interests that the Court identified as an important consideration in selecting the most appropriate

[22] As the unions' brief in No. 85-2010 demonstrates, this theory of liability is legally unsupportable under both § 1981 and Title VII. For purposes of this discussion, however, we assume *arguendo* that such a claim can be a basis for liability under § 1981.

statute of limitations for the federal civil rights statutes was certainty:

> . . . Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.

471 U.S. at 275. Characterizing § 1981 claims as claims for tortious interference with contract relations, rather than as claims for personal injury, would defeat this federal interest in certainty and would produce unnecessary litigation.

In *Wilson v. Garcia* one of the factors supporting the selection of personal injury statutes of limitations was that general personal injury actions "constitute a major part of the total volume of civil litigation in the state courts today." 471 U.S. at 275. The large volume of such claims makes it relatively easy to determine which statute of limitations applies to such claims in each state. Actions for tortious interference with contracts are far less common, and there is a much greater degree of uncertainty about the applicable period of limitations. Only two states have statutes of limitations that expressly apply to actions for tortious interference.[23] Only

[23] Colorado has a 2-year statute of limitations that applies to all "[t]ort actions," including specifically actions for "interference with relationships." Colo. Rev. Stat. § 13-80-102(1)(a). Florida has a 4-year statute that applies to all "intentional tort[s]," including specifically the tort of "malicious interference." Fla. Stat. Ann. § 95.11(3)(o). "Malicious interference" is a term that has been used historically to refer to the tort of intentional interference with contractual relations. *Prosser & Keeton on Torts* § 129, at 979 (5th ed. 1984).

about half of the remaining states have decisional law on the question of what limitations period applies to tortious interference cases, and those decisions are divided, with most states applying personal injury limitations periods or periods that apply to injuries to property, and with one state applying a contract limitations period.[24] Of even greater concern, nearly half of the states appear to have no decisional law that determines what limitations period applies to tortious interference claims.[25]

---

[24] For example, Alabama applies Ala. Code § 6-2-39(5), which prescribes a 1-year period applicable to "injury to the person or rights of another not arising from contract." *See Lincoln Teng v. Hrishikesh Saha*, 477 So. 2d 378 (Ala. 1985). Oregon applies a 2-year limitation applicable to "injury to the person or rights of another not arising on contract." *See Cramer v. Stonebridge*, 713 P.2d 645 (Ore. App. 1986). Wisconsin applies a 6-year period applicable to "injury to character or rights of another, not arising in contract." *Segall v. Hurwitz*, 339 N.W. 2d 333 (Wis. App. 1983). Georgia applies a 4-year period applicable to injuries to personal property. *See Hill v. Crabb*, 304 S.E. 2d 510 (Ga. App. 1983). Iowa applies a 5-year period applicable to injuries to property. *See Johnson v. Nelson*, 275 N.W.2d 427 (Iowa 1979). Michigan applies a 3-year period applicable to actions for injury to persons or property. *Wilkerson v. Carlo*, 300 N.W. 2d 658 (Mich. App. 1980). Under the current Pennsylvania scheme of limitations, Pennsylvania applies a 2-year period applicable to injuries to personal property. *Bender v. McIlhattan*, No. 00640 (Pa. Super. Ct., Jan. 5, 1987). Texas applies a 4-year period applicable to actions for injury to property. *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W. 2d 287 (Tex. 1986). New York applies a 3-year period applicable to actions for injury to property. *Williams v. Arpre*, 391 N.Y. Supp. 2d 740 (App. Div. 1977). And California applies the 2-year limitation period that applies to an action upon a contract or an obligation or liability not founded on a written instrument. Cal. Code of Civil Procedure § 339(1) (West); *McFaddin v. H.S. Crocker Co.*, 219 Cal. App. 2d 585, 33 Cal. Rptr. 389 (1963).

[25] Our research indicates that each of the following 22 states has more than one limitations period of the sort that other states have used to limit actions for tortious interference with contract relations, and also has no reported decisional law on the question of which limitations period applies: Connecticut, Delaware, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Missouri, Nebraska,

If § 1981 claims were characterized as actions for tortious interference with contracts, there would be substantial uncertainty in those states as to what the limitations period would be, and that uncertainty would produce needless litigation that could be avoided entirely by giving § 1981 claims the same characterization as § 1983 claims.[26]

For these reasons, state law limitations periods for claims of tortious interference are not the proper limitations periods to apply in § 1981 cases.[27]

Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, Vermont, Washington, and Wyoming.

[26] Plaintiffs suggest that confusion was also engendered by *Wilson v. Garcia* in those states that prescribe different statutes of limitations for different types of personal injuries. Brief for Petitioners, at 19 n.11; *see Mulligan v. Hazard*, 106 S. Ct. 2902, 2903 (1986) (dissent from denial of certiorari). The fact remains, however, that the selection of a statute of limitations for use in § 1983 cases will have to be made in each of those states under *Wilson v. Garcia*. If the same statute is used in § 1981 cases, that selection will only have to be made once, and it will thereafter be clear which limitations period applies to claims under *both* federal statutes. Adoption of a different characterization for § 1981 claims —especially one as to which the limitations period is as unsettled as tortious interference with contracts—would only compound the uncertainty and the need for litigation of collateral issues.

[27] Plaintiffs argue that the characterization of tortious interference is more appropriate than personal injury because § 1981 claims "normally involve 'patterned-type behavior, frequently involving documentary proof,'" so that "'the passage of time is less likely to impede the proof of facts.'" Brief for Petitioners, at 20, quoting from *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 903 n.26 (3d Cir. 1977). This argument is based on an assumption that states generally apply a longer limitations period, such as the limitations period applicable to actions based on contracts, to claims of tortious interference than to personal injuries. That assumption is not true; only one state applies a contract limitations period as such, and the prevailing practice is to use a limitations period that applies to injuries to persons or injuries to property rights. *See* pages 29-30 & note 24, *supra*. More-

II. THE STATE STATUTE OF LIMITATIONS FOR PERSONAL INJURY CLAIMS SHOULD GOVERN THE § 1981 CLAIMS IN THE INSTANT CASE.

1. Plaintiffs contend that if this Court determines that state statutes of limitations for personal injury claims govern § 1981 claims, that rule should not be applied in this case. Plaintiffs argue this point as if the rule governing the choice of limitations periods in § 1981 actions were already established by a prior decision of this Court—*Wilson v. Garcia*—and as if the question here were whether that rule should be applied retroactively to the instant case, which was pending on appeal when *Wilson* was decided. But *Wilson* did not decide the rule governing the limitations period for § 1981 cases. *Wilson* decided only what the rule should be in § 1983 cases.

---

over, even if a longer limitations period *were* generally applied to tortious interference claims than to other torts, plaintiffs' argument that a longer period of limitations is appropriate for § 1981 claims is based on a mistaken view of the nature of such claims. Because the essence of every § 1981 claim is intentional discrimination, it is simply wrong to think that § 1981 claims, like contract claims, can be proved largely through documents. The memories of witnesses are crucial to the proof or defense of claims of wrongful motivation. Moreover, it is a fiction to assume that most § 1981 claims are based on written contracts; in reality, the typical claim of employment discrimination is based, like that in *McDonald v. Santa Fe Trails, supra*, on one or more incidents, for example a discharge, in which it is alleged that black and white employees were treated differently because of race. *See also* pages 47-48, *infra*.

Nor is a longer limitations period necessary or appropriate to allow time for resort to EEOC or state conciliation processes before filing suit, as plaintiffs argue. Brief for Petitioners, at 21. That issue was laid to rest in *Johnson v. Railway Express Agency, supra*, by the Court's holding that Title VII and § 1981 are "separate, distinct, and independent" remedies, 421 U.S. at 461, and that Congress did not intend to require or encourage exhaustion of Title VII administrative remedies before resort to the courts to pursue a § 1981 claim, *id.* at 465-66. *See also Board of Regents v. Tomanio*, 446 U.S. 478, 490-91 (1980).

It is true that, as we have argued in part I of this brief, the principles and the analysis of *Wilson* point the way to the resolution of the question of the appropriate limitations period in § 1981 cases. No party here suggests, however, that *Wilson* definitively resolved that question. The first question presented in the petition and the argument plaintiffs make in connection with that question are evidence enough that in the instant case this Court is being asked to resolve as a matter of first impression the issue—heretofore unresolved by this Court—of the limitations period applicable in § 1981 cases.

Thus, the question here is not whether *Wilson* should be applied retroactively. Rather, the question is whether the rule adopted in this case as a matter of first impression should be applied to the parties in this case. When the issue is so understood, it is apparent that the result urged by petitioners is fundamentally at odds with a most basic principle of this Court's jurisprudence: this Court does not decide questions put in the abstract or issue advisory opinions; this Court resolves real issues that affect the real interests of the parties before the Court. It would not be faithful to this principle to decide *in this case* that the state statute of limitations for personal injury actions is applicable to § 1981 actions, and then not apply that decision to this § 1981 action.

In *Stovall v. Denno*, 388 U.S. 293, 300-301 (1967), this Court stated that the practice of applying the rule established in a case to resolve the issue between the parties in that case is of constitutional dimension. The *Stovall* Court decided that *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), were not to have retroactive application. All three cases were decided on the same day. Yet, the upshot of the decisions was that Wade and Gilbert were given the benefit of the new rules established in their

cases, while Stovall was not. The *Stovall* Court gave the following explanation:

> We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making. [*Stovall v. Denno*, *supra*, 388 U.S. at 301, footnotes omitted.]

Since *Stovall*, the members of this Court have continued to debate, in the context of criminal cases, whether and how to address the "arguable inequity" discussed in the quoted passage, but the common ground of that debate is that the parties to the case that announces a rule of law must be given the benefit of the rule announced in that case. See, *e.g.*, the various opinions in *Griffith v. Kentucky*, —— U.S. ——, 107 S.Ct. 708, 713, 718-19 (1987); *Shea v. Louisiana*, 470 U.S. 51, 60, 63-64, (1985).[28]

---

[28] Petitioners' brief, at 26 n.13, suggests that it may be consistent with Article III for a federal court to issue a decision that "applies only to cases arising after the date of the decision, and not to the parties before the Court." The only case cited in support of that suggestion is *Allen v. State Board of Elections*, 393 U.S. 544 (1969). *Allen*, however, did not pose any Article III problem. In *Allen*, the Court applied the rule established in that case to reverse the judgments of the lower courts and to direct the issuance of injunctions against the defendants. The Court declined only to issue certain equitable relief that had been requested by the plaintiffs—an injunction directing the re-running of elections that had already been held. *Id.* at 571-72. See note 32, *infra*.

Similarly, the suggestion has appeared in *dicta* in several of this Court's opinions that it is an open question whether Article III permits this Court to issue a purely prospective rule—one that does not even apply to the parties in the case in which the rule is announced. See *United States v. Johnson*, 457 U.S. 537, 544-545 (1982); *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) (pre-*Stovall*); *Linkletter v. Walker*, 381 U.S. 618, 622 n.3 (1965) (pre-*Stovall*). But none of the cases cited in these *dicta* as examples of purely prospective decisions posed a problem under Article III. Thus, in *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972)—cited as an example of purely prospective decision-making in *United States v. Johnson*—the Court remanded the case for development of an adequate record in order to determine, *inter alia*, whether "the procedures followed by the Parole Board are found to meet the standards laid down in this opinion. . . ." In *James v. United States*, 366 U.S. 213, 221-22 (1961)—cited as an example in both *Johnson* cases—the Court overruled an earlier decision but went on to hold that the defendant could not be convicted under the new rule because "the element of wilfullness could not be proven in a criminal prosecution . . . so long as the statute contained the gloss placed upon it by [the earlier decision] at the time the alleged crime was committed." Finally, in *England v. Medical Examiners*, 375 U.S. 411 (1964)—cited as an example in both *Johnson* cases and in *Linkletter*—the Court clarified a ruling issued in an earlier decision but held that the plaintiff should not be bound by the earlier ruling as clarified because he was reasonably misled by the wording of the prior decision. In none of these three cases—*Morrissey*, *James*, or *England*—did the Court address the possibility of an Article III problem.

And, whether or not constitutionally required, it has been this Court's consistent practice, in civil and criminal cases, to apply the rule of law adopted in a case to resolve the dispute between the parties in that case.[29] In

---

[29] Just as the court has consistently applied the rule adopted in a case to the parties in that case, the "Court has consistently de-

particular, this practice has been invariable in the context of this Court's decisions determining questions respecting limitations periods. See, *e.g.*, *United States v. Mottaz*, —— U.S. ——, 106 S.Ct. 2224 (1986); *DelCostello v. Teamsters*, 462 U.S. 151 (1983); *Block v. North Dakota*, 461 U.S. 273 (1983); *United States v. Kubrick*, 444 U.S. 111 (1979); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966); *Soriano v. United States*, 352 U.S. 270 (1957); *Globe Indemnity Co. v. United States*, 291 U.S. 476 (1934); *Reading Co. v. Koons*, 271 U.S. 58 (1926). Indeed, in each of the cases just listed, application of the rule adopted in the case had the effect of barring a claim asserted by a plaintiff in that case.[30] Whatever the rule adopted in this case may be, "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution," *Stovall*, 388 U.S. at 301, require

---

clined to reach out to resolve unsettled questions, regarding the scope or meaning of decisions establishing 'new' constitutional requirements in cases in which it holds any such decisions nonretroactive." *Michigan v. Payne*, 412 U.S. 47, 49 n.3 (1973).

[30] *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is not to the contrary. In *Chevron*, the rule governing the statute of limitations to be applied was established in a prior case, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). *Rodrigue* had decided that under the Lands Act state law, not admiralty law, governed actions of the type brought by Huson, the plaintiff in *Chevron*. Under admiralty law, the doctrine of laches would apply and Huson's claim would not have been barred. The *Chevron* Court found that the rule of *Rodrigue*, if applied retroactively, would have required Huson's case to be governed by the state limitations statute—under which Huson's suit would have been barred—rather than the doctrine of laches. But the Court determined not to apply the *Rodrigue* rule retroactively to govern Huson's action. Thus, *Chevron* determined not to apply retroactively the decision of another case, *Rodrigue*, which otherwise would have controlled the outcome of the dispute between Huson and Chevron.

that that rule be applied to govern the dispute between the parties in this case.

2. Even if, *arguendo*, it were appropriate to characterize the issue here as the retroactivity of the *Wilson v. Garcia* rule, the standards established by this Court to determine such questions would require that the rule be applied in this case.

"As a rule, judicial decisions apply 'retroactively.' . . . Indeed, a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). In the context of civil cases, this Court has held from the earliest times that "the general rule . . . is that an appellate court *must* apply the law in effect at the time it renders its decisions." *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969) (emphasis added). "A change in the law between a *nisi prius* and an appellate decision *requires* the appellate court to apply the changed law." *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943) (emphasis added). This rule was first articulated and explained by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801):

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment *must* be set aside. [Emphasis added.]

The rule "has been applied where the change [in law] was constitutional, statutory, or judicial." *Thorpe v. Housing Authority*, 393 U.S. at 282 (footnotes omitted); see also *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 541 (1941).

In *Chevron v. Huson, supra*, this Court, without referring to the *Schooner Peggy* line of decisions, defined what must be taken as an exception to the general rule that in civil cases an appellate court must "apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority, supra*, 393 U.S. at 281.[31] The *Chevron* exception permits appellate courts not to apply an intervening change in the law where the change so alters the rules that could reasonably have been relied upon at the outset of a case as to cause substantial inequity or hardship, and where nonretroactive application of the new rule would not be inconsistent with the rule's purpose. The *Chevron* Court stated the criteria for this exception in the following terms:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481,] 496 [(1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen v. State Board of Elections, supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for

[31] There is no doubt that the *Schooner Peggy* rule remains vital after *Chevron*. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Bradley v. Richmond School Board*, 416 U.S. 696, 711-21 (1974).

> "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S. 701,] 706 [(1969)]. [404 U.S. at 106-07.]

The first of these criteria is obviously a *sine qua non* for any determination of nonretroactivity. The words used by the Court, "*must* establish," leave no room for doubt on this point. And the Court's reference to the decision in *Hanover Shoe* provides further confirmation. At the page cited in *Chevron*, the *Hanover Shoe* Court stated:

> Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble-damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals. [392 U.S. at 496.]

Moreover, unless there is a clear break with established past precedent the other factors in the Court's test would not even come into play. Unless parties may have reasonably relied on the prior rule of law there is no occasion to consider whether the new rule—which after all will govern all future cases—may produce "substantial inequit[y]" or whether it would be inconsistent with the purposes of that rule not to apply the rule retroactively. Indeed, in applying the *Chevron* test to the facts of *Chevron*,

this Court pointed to the abrupt change in the governing rule and the unforeseeable nature of that change in its discussion of all three factors. 404 U.S. at 107-08.

In this case, petitioners cannot pass the threshold of the first *Chevron* factor. Petitioners cannot show that application of the Pennsylvania statute of limitations for personal injury claims to the § 1981 claims in this case "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106.[32] In a statute of limitations case, the pertinent

[32] The second element of this factor—"by deciding an issue of first impression whose resolution was not clearly foreshadowed"—has never been fully elucidated. The case cited by the *Chevron* Court in this connection, *Allen v. State Board of Elections*, was not strictly speaking a retroactivity case. See note 28, *supra*. The Court in *Allen* was called upon to construe the Voting Rights Act of 1965 shortly after the passage of that Act. At issue were questions of first impression as to which types of state enactments were covered by that Act. The Court ruled that all of the enactments were covered by the Act and remanded the case "with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with [the Act]." 393 U.S. at 572. But because "[t]he state enactments were not so clearly subject to [the Act] that the [States'] failure to submit them for approval constituted deliberate defiance of the Act," and because "the discriminatory purpose or effect of these statutes, if any, has not been determined by any court," the *Allen* Court declined to order that elections already conducted pursuant to the enactment be re-run. *Id.*

The only decision of this Court since *Chevron* to discuss this element of the first factor of the *Chevron* test is *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). In *Northern Pipeline*, this Court struck down, as violative of Article III of the Constitution, a significant part of the jurisdiction of bankruptcy courts established by the then recently-enacted Bankruptcy Act of 1978. The Court affirmed the dismissal of the suit brought in bankruptcy court pursuant to the invalid portion of the Act by Northern Pipeline against Marathon Pipe Line. But the Court stated that its decision was not to be applied retroactively. The Court found that its decision "'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases." *Id.* at 88. The Court explained: "It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III." *Id.* As long as the particular jurisdictional provision of the Bankruptcy Act had not been held invalid, it was not unreasonable for litigants to rely on that provision. And thus retroactive application of the Court's invalidation of that provision "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.*

It is not possible based on *Allen* and *Northern Pipeline* to define with precision the category of cases covered by the second element of the first *Chevron* factor. Both cases have in common the reasonable reliance of litigants upon a construction of a newly adopted statute and a subsequent decision of this Court holding that construction incorrect as a matter of first impression. The *Chevron* Court also made clear that the judicial construction has to have been one that "was not clearly foreshadowed." 404 U.S. at 106. Whatever the precise contours of this category of cases, the instant case is not in that category. There is no contention here that reasonable reliance could have been placed upon the language of any statute, newly enacted or otherwise. Rather this case is appropriately measured against the first element of the first *Chevron* factor—does a ruling that the state law limitations period for personal injury claims governs § 1981 actions "overrul[e] clear past precedent on which litigants may have relied." Because, as we discuss in text, *infra* at 40-45, a ruling that Pennsylvania's personal injury limitations period applies would neither be inconsistent with the precedent existing when this case was filed, nor "not clearly foreshadowed," petitioners could not in any event prevail under either element of the first *Chevron* factor.

time frame for determining the prior state of the law is the period commencing with the alleged wrongdoing and ending with the filing of the lawsuit. That is the period in which a plaintiff had an option as to when to file a suit, and therefore that is the period in which a plaintiff may have decided to expedite or delay the filing of a suit depending on his understanding of the applicable limitations statute. This time frame defines the period of pos-

sible reliance, and the *Chevron* Court made clear that the "clear past precedent" overruled must be precedent "on which litigants may have relied." 404 U.S. at 106. The Court in *Chevron* focused on this time frame:

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pre-trial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. [404 U.S. at 107.]

As we now show, in the period preceding the filing of this lawsuit, and indeed for several years after the suit was filed, there was *no* precedent in the Third Circuit on which plaintiffs could have relied to support a limitations period longer than two years.[33] Nor was there any

---

[33] When this Court overrules a rule of uniform national application, then application of the *Chevron* factors should result in a decision as to the retroactivity or nonretroactivity of the new rule that is also uniform among all the circuits. *Chevron* itself is such a case. But when the prior rule—to the extent there was a prior rule—was a function both of differing state laws and of differing approaches of the circuits, then proper application of the *Chevron* factors may lead to results that differ from circuit to circuit, and in some cases from state to state within the same circuit. In one state or circuit there may have been clear past precedent on which a plaintiff may have reasonably relied to his detriment. In another state or circuit there may have been no such past precedent.

The decisions of the circuits respecting the retroactivity of *Wilson v. Garcia* are consistent in reflecting this reality; they have adopted the uniform procedure of inquiring whether *Wilson* overruled clear circuit precedent that was in effect at the time the particular suit in question was filed and thus on which the plaintiff may have reasonably relied. See, *e.g.*, *Small v. Inhabitants of the City of Belfast*, 796 F.2d 544, 549 n.6 (1st Cir. 1986); *Loy v. Clamme*, 804 F.2d 405, 407-08 (7th Cir. 1986) (per curiam); *Anton v. Lehpamer*, 787 F.2d 1141, 1146 n.7 (7th Cir. 1986); *Ridgway v. Wapello County*, 795 F.2d 646, 647-48 (8th Cir. 1986); *Farmer v. Cook*, 782 F.2d 780, 781 (8th Cir. 1986) (per curiam); *Wycoff v. Menke*, 773 F.2d 983, 986 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1230 (1986); *Gibson v. United States*, 781 F.2d 1334, 1339-40 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 928 (1987); *Williams v. City of Atlanta*, 794 F.2d 624, 626-27 (11th Cir. 1986). *Cf. Abbitt v. Franklin*, 731 F.2d 661, 663-64 (10th Cir. 1984) (using same analysis in deciding not to apply retroactively Tenth Circuit's own holding in *Garcia v. Wilson*); *Jackson v. City of Bloomfield*, 731 F.2d 652, 654-55 (10th Cir. 1984) (same). As these decisions reflect, the courts of appeals have had little difficulty in assessing the clarity of their own past precedents. Other circuits have applied *Wilson v. Garcia* retroactively without any discussion of the *Chevron* factors. *See Gates v. Spinks*, 771 F.2d 916, 917-19 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1378 (1986); *Mulligan v. Hazard*, 777 F.2d 340, 343-44 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986).

pattern of decisions from other circuits that could have given plaintiffs any comfort on that score. There was at that time no more reason to expect a 6-year period than a 2-year period. And, indeed, promptly after the suit was filed, the parties joined issue as to what limitations period should apply to the plaintiffs' § 1981 claims, with Lukens contending that the 2-year period should apply.

In *Al-Khazraji v. Saint Francis College*, *supra*, 784 F.2d at 512, the Third Circuit, speaking of the instant case, stated: "In 1973, when the complaint was filed in the *Goodman* case, there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims." See also *Malley-Duff & Associates v. Crown Life Ins. Co.*, *supra*, 792 F.2d at 345 n.10. The Third Circuit's characterization of its own precedents is, not surprisingly, completely accurate. As of the time the complaint was filed in this case, there had not been a single Third Circuit decision on the question of what limitations period to apply in § 1981 cases. Indeed, as of that time, there had not been a single district court opinion addressing which Pennsylvania limitations period to apply. Throughout the entire Circuit the issue of the appropriate limitations period in § 1981 actions had at that time been addressed only in a lone

decision in the New Jersey District Court, deciding which New Jersey limitations period to apply.[34]

The dearth of precedent was evident in the papers filed by the parties in the district court on the issue of the limitations period to be applied to plaintiffs' § 1981 claims. The issue was raised and litigated at an early point in the litigation. Defendant Lukens argued as follows:

> [T]here is persuasive authority that the gravamen of a Section 1981 action is in tort, and that the two-year Pennsylvania tort statute of limitations should limit the claims asserted on behalf of the class. See, e.g., *Buckner v. Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972); *Wells v. Gainesville-Hall County Economics Opportunity Organization, Inc.*, —— F. Supp. —— (N.D. Ga. 1973), 5 E.P.D. (CCH) ¶ 8541; *Ripp v. Dobbs Houses, Inc.*, —— F. Supp. —— (N.D. Ala., Sept. 14, 1973), 6 E.P.D. (CCH) ¶ 8840; *Johnson v. Railway Express Agency, Inc.*, —— F.2d ——, (6th Cir., November 27, 1973), 6 E.P.D. (CCH) ¶ 8963.[35]

The union defendants contended for the 90-day period governing complaints of employment discrimination under the Pennsylvania Human Relations Act. See *supra* at pages 3-4. And plaintiffs argued for the 6-year Pennsylvania statute governing contract actions, *without citing any Third Circuit authority for that selection*:

> While Section 1981 does not contain its own statute of limitations, Courts have held that it is subject to the statute of limitations which governs the most nearly analogous state cause of action. *Young v. International Tel. & Tel. Co.*, 438 F. 2d 757 (3d Cir. 1971). The state causes of action most nearly analogous to Section 1981 as applied herein are based on employment contracts. *See, Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971) and *Green v. McDonnell-Douglass Corp.*, 318 F. Supp. 846, 849 (E.D.Mo. 1970). As the court stated in *Boudreaux*, "[i]t is, after all, the right to 'make and enforce contracts' which is protected by Section 1981." 437 F.2d at 1017, n.16; *See, Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 488 (7th Cir.) *cert. denied*, 400 U.S. 831 (1970) 491 [sic]. Similarly, in *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5th Cir. 1973), the court applied the appropriate state statute of limitations governing actions for unpaid wages.[36]

[34] That case was *Page v. Curtiss-Wright Corporation*, 332 F. Supp. 1060 (D.N.J. 1971). The papers filed by plaintiffs in the district court respecting the limitations issue in the instant case did not even mention the *Page* case. See *infra* at pages 44-45.

[35] See note 4, *infra*.

Thus, it is an understatement to say that the Third Circuit was correct in finding an absence of "clear past precedent on which litigants may have relied." 404 U.S. at 107. From the outset of this litigation plaintiffs could reasonably conclude only that the issue was an open one.

Accordingly, the argument for nonretroactivity here fails at the threshold. Without an "overruling [of] clear past precedent on which litigants may have relied," there is no occasion to depart from the rule of *Schooner Peggy*. See *supra* at pages 37-38. While in our view the absence of a break from clear precedent is thus conclusive of the retroactivity issue, we proceed briefly to discuss the applicability of the remaining *Chevron* factors.

The second *Chevron* factor asks "whether retrospective operation [of the rule in question] will further or retard its operation." 404 U.S. at 97. The meaning of this factor is elucidated by reference to the case from which this factor was derived, *Linkletter v. Walker*, *supra*. In the words quoted by *Chevron* the *Linkletter* Court was

[36] See note 7, *supra*.

addressing a problem peculiar to the issue before it. The issue in *Linkletter* was the retroactivity of *Mapp v. Ohio*, 367 U.S. 643 (1961), which held that the states were obligated to apply the exclusionary rule to evidence seized in violation of the Fourth Amendment. Because the purpose of the exclusionary rule was to deter unlawful police conduct, the *Linkletter* Court concluded that:

> We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late. [381 U.S. at 637.]

The rule involved here is of a different nature. Here, if this Court decides that the state statute of limitations for personal injury claims applies to § 1981 claims, the purpose of this statute of limitations is presumably the same as that of any limitations period. It reflects the legislature's judgment as to where the line should be drawn between preservation of a plaintiff's claim and protection of the legitimate interests of a defendant, which may be undermined as the period lengthens between injury and suit. Central among the latter interests is the fair opportunity of a defendant to defend against the charges facing him, which opportunity may be undermined as time passes by the dimming of memories, the loss of documents, and the death or disappearance of witnesses. This opportunity goes to the integrity of the fact-finding process. See *Board of Regents v. Tomanio, supra*, 446 U.S. at 487 ("[I]n the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to impair the accuracy of the fact-finding process . . . that a substantive claim will be barred without respect to whether it is meritorious"); *Wilson v. Garcia, supra*, 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost"). The legislature must judge, according to the nature of the action, at which point this fair opportunity is endangered by the passage of time. That judgment is implicit in every statute of limitations. This legislative purpose is not fulfilled if the limitations period deemed appropriate by the legislature, and applicable to all future cases, is not applied to cases pending on appeal.

That this point is not merely academic is illustrated by the instant case. In a case such as this, where intentional discrimination is the issue, the difference between a 6-year limitations period and a 2-year limitations period is substantial in terms of the integrity of the fact-finding process. For example, with respect to plaintiffs' claim of racial harassment, the memories of witnesses were so dim that the district court was unable in many instances to determine whether the incidents described in testimony occurred within or without the 6-year limitations period: "plaintiffs' evidence clearly fixes about 35 incidents as having occurred within the limitations period, and about an equal number as having occurred either within the limitations period or shortly before—*e.g.*, 'in the late 1960s' or 'between 1965 and 1970.'" (Pet. App. A125). Moreover, most of plaintiffs' statistical evidence covered only the two years immediately preceding filing of the suit and did not extend over the rest of the 6-year limitations period adopted by the district court. Plaintiffs' statistical expert explained that because of changes made in 1971 in Lukens' computer record system, "I was unable to match jobs pre- and post-4/16/71, and as a result, the analysis conducted relies only on data since 4/16/71." [37] As a final example, shortly before the trial of this case, one of the unions'

[37] Plaintiff's Exhibit 501, at p. 1; Tr. 4.19, 4.23.

key witnesses—a black employee who for years had been vice president of the local union and chairman of the grievance committee—died.[38] As these examples reflect, it furthers the legislative purpose implicit in the adoption of the 2-year limitations period to apply that period to this case, just as to cases in the future.

The third *Chevron* factor—whether retroactive application of the state limitations period for personal injury claims to § 1981 claims would "produce substantial inequitable results" resulting in "injustice or hardship"—is very much a function of the first *Chevron* factor.[39] If, as we have shown, there was no clear precedent on which plaintiffs could have relied in the period preceding the filing of the suit, there is simply no inequity here.

Plaintiffs describe the long and complicated discovery period and trial in this case—most of which, in any event, was focused on evidence of matters occurring in the approximately nine-year period between the beginning of the 2-year limitations period and the trial of the case. See Brief for Petitioners, at 41-42. But plaintiffs knew from the outset that the limitations period for § 1981 claims was a contested issue, and one as to which there

[38] Union Exhibit 655, admitted in evidence at Tr. 25, 135; I JA 191, 194, 207; II JA 714-15.

[39] The words of the third *Chevron* factor are quoted from *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). In *Cipriano*, the Court held that an election authorizing the issuance of municipal bonds was invalid because only property taxpayers had been given the right to vote. The Court decided that its decision would apply to elections that had already been conducted "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not final." *Id.* The Court determined that to give any greater retrospective effect to its decision would cause "[s]ignificant hardships . . . [to] cities, bondholders, and others connected with municipal utilities." *Id.* These "hardships"—involving, *inter alia*, innocent third parties—are what the Court had reference to in the language quoted in *Chevron*.

was no clear precedent. Even after the district court had ruled that the 6-year period applied, plaintiffs could reasonably expect only that, like other rulings of the court, this ruling would be subject to possible reversal on appeal. Plaintiffs took the same chance as any litigant does with regard to any contested issue, no more and no less. It is the nature of our adversary system that as to each contested issue litigated to a conclusion one side will win and the other side will lose. There are no guarantees in this process, and it is no more inequitable for a plaintiff to lose than for a defendant to lose. *Cf. Board of Regents v. Tomanio*, *supra*, 446 U.S. at 487.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed insofar as it directs that the Pennsylvania statute of limitations for personal injury claims should apply to the § 1981 claims in this case.

Respectfully submitted,

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
JULIA PENNY CLARK *
MICHAEL H. GOTTESMAN
JOHN ROTHCHILD
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Respondents

* Counsel of Record